No. 297.

Brf. of Atty. Gen.l (Richards v. Reynolds)
for Appellant.

Filed Dec. 31, 1897.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES, APPELLANT,
v.
FREDERICK MAISH AND THOMAS DRISCOLL, partners as Maish and Driscoll.
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APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

ABSTRACT, STATEMENT, AND BRIEF ON BEHALF OF THE UNITED STATES.

CANOA GRANT IN ARIZONA.

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ABSTRACT AND STATEMENT.

Suit was instituted by MAISH AND DRISCOLL, a firm composed of Frederick Maish and Thomas Driscoll, on the 1st day of March, 1893, for the confirmation of two grants situated in Arizona, one known as the SAN YGNACIO DE LA CANOA grant and the other as the MARIA SANTISIMA DEL CARMEN, or BUENA VISTA grant.

Upon suggestion of counsel for the government that there was a misjoinder of causes of action, by reason of two independent grants being included in one petition, plaintiffs filed an amended petition for the confirmation of the SAN YGNACIO DE LA CANOA grant. (R., 7–11.)

Under the amended petition, plaintiffs, as copartners, claimed to be the owners in fee of the Canoa grant, claiming the same by grant title bearing date the 2d of February, 1849, duly made and executed by Antonio Teran y Paralta, treasurer-general of the free and sovereign state of Sonora, in the republic of Mexico, in the name of the sovereignty of said state, under and by virtue of article 11 of the general sovereign decree No. 70, passed on the 4th day of August, 1824, by the congress of Mexico, alleging that said article concedes to the states of the republic of Mexico the rents or revenues which by said law are not reserved to the general government, one of which revenues is the vacant lands within the respective states; and that by virtue of law No. 30, of May 20, 1825, and other decrees relative thereto, to wit, sections 3, 4, 5, 6, and 7, of chapter 9 of the organic law of the treasury, No. 26, of July 26, 1834, the disposition of such lands was vested in the states of Sonora and Sinaloa. That under and by virtue of such laws and decrees such proceedings were had as that the said treasurer-general of the state of Sonora, in the name of the state, duly and regularly, and for a good and valuable consideration, to wit, the sum of two hundred and fifty dollars, and for other good and valuable considerations in said grant title set forth, did, on the

2d day of February, 1849, sell and convey in fee to Tomas and Ygnacio Ortiz the land known as the San Ygnacio de la Canoa grant.

It is further alleged that the proceedings resulting in the issuance of said title were instituted by a petition dated September 6, 1820, addressed to the governor intendant, who was then the officer of the Spanish government having charge of and exclusive jurisdiction in the matter of sales of public lands in the jurisdiction of Tubac, in which jurisdiction the lands thus petitioned for were situated; that proceedings of survey, valuation, and publication were taken on said petition, as required by the instructions and laws of the royal ordinance of intendants of December 4, 1786, and that on December 15, 1821, the tract petitioned for and as surveyed according to the calls of the *expediente* thereof was sold by the officers of the Mexican republic to Tomas and Ygnacio Ortiz for the sum of two hundred and fifty dollars, which amount was thereupon paid by said grantees into the national treasury of the Mexican republic; that the said sale was on December 17, 1821, approved by the *provincial junta de hacienda*, or provisional assembly of the national public lands, and on the same day referred to the superior board of the treasury for its approval; that before it could be approved, the said superior board of the treasury was abolished, and no further proceedings were taken thereon until January 30, 1849, when the said grantees applied to the treasurer-general of the state of Sonora for the issuance to them of the formal title to the said lands for which they had made

payment as aforesaid, whereupon there was issued to them on the 2d day of February, 1849, the final *testimonio* or evidence of title, and the same was fully recorded on page 75 of the book of *toma de razon* for the said year 1849. To the petition was attached a sketch-map showing the location and boundaries of the grant as claimed by the claimants.

The further allegations of the petition relate to the presentation of the title to the surveyor-general of the territory of Arizona under the law of 1854. The surveyor-general reported the matter favorably to congress, but no further action was taken. (R., 7–11.)

The allegations of the petition were placed in issue by the United States.

The claim is based upon a *testimonio* or *titulo*, offered in evidence by the plaintiffs and marked "Exhibit A" (R., 30–52), and it will be noticed that the officers participating in making up the *expediente* in this grant are the same as those in the Sonoita grant, and that the two grantees, Tomas and Ygnacio Ortiz, also participate in making up the Sonoita *expediente*.

The preamble to this *testimonio* (R., 30) recites as authority national decree No. 70, of August 4, 1824, the law of the state of Sonora and Sinaloa, No. 30, of May 20, 1825, and sections 3, 4, 5, 6, and 7 of chapter 9, of law No. 26, of July 11, 1834, and the national law of September 17, 1846.

The petition dated September 6, 1820, asked for FOUR *sitios* of land at the place called La Canoa, for the purposes of agriculture and the raising of stock. This petition was not acted upon until May 29, 1821, when the

formal order for survey, appraisement and valuation, and thirty days' notice was made.

The survey was commenced on July 10, 1821 (R., 33), and after providing the measuring cord of fifty *varas* and taking as a center the place pointed out by the petitioners, and called San Ygnacio de la Canoa, they measured in a northerly direction along the public road leading to the *presidio* of Tubac three hundred and seventy-eight *cordeles*, when they reached a place called Saguarito, where there stands a plant of that name, which was to remain as a boundary until a suitable monument could be erected, it being about five leagues distant from the mission of San Xavier del Bac. From this place they measured in a westerly direction fifty *cordeles*, which brought them to a hill with many black rocks, standing alone, whose brow was covered with giant cactus and *palo verde* trees, and on top of said hill a pile of stones was ordered placed as a monument. Returning to the boundary mark of Saguarito, they measured in an easterly direction fifty *cordeles*, which brought them on the same low ground to a spot fronting the point of the mountain called Sierrita del Puerto de los Muchachos, where a cross was erected as a sign for a monument. Returning to the center, they measured in a westerly direction fifty *cordeles* along a *cañada* facing the Sierrita de la Tinaja, which brought them to a little knoll on the right side of said *cañada*, upon which was placed a pile of stones as a monument. Returning to the center, they measured in an easterly direction fifty *cordeles*, at the end of which they arrived at a vast low table-land, very even and flat, in front of which the Santa Rita mountains begin

to slope, there being at the right a *cañon* which extends toward said mountains, where another pile of stones was ordered placed as a monument.

On the following day the survey was continued. (R., 34.) Commencing at the center, they measured twenty-two *cordeles* in a southerly course along the public road, which brought them against the boundary line of the measurements established by the military post and company of Pimas at Tubac, where it was ordered that a cross should be painted as a sign for a monument, which was done upon a *mezquite* tree. From this point fifty *cordeles* was measured in a westerly direction, which brought them to some low hills, where a pile of stones was placed as a monument. Returning to the *mezquite* tree on which the cross was painted, they measured in an easterly direction, which brought them to a low, stony table-land, facing the Santa Rita mountains, by the *cañon* known as the Madera (the lumber *cañon*) upon the same line of boundary measurements established for the said post of Tubac. The measurements having been concluded, the result was four *sitios* for the raising of cattle and horses, as registered by Tomas and Ygnacio Ortiz, of the *presidio* of Tubac.

The land was appraised at thirty dollars per *sitio* (R., 35), and it will be noticed that this appraisement was not signed by the marker, José Antonio Figueroa, and the measurers, Juan José Orosco and Manuel Castro, who were appointed (R., 32) to fill these positions.

The order for the thirty days' publication was made on July 12, 1821. (R., 35–36.)

The first publication was on July 14, 1821 (R., 36), in which it was stated that the amount of land which was to be sold was FOUR *sitios* for the raising of cattle and horses.

At the last publication, on August 12, 1821 (R., 41), it appears that Rev. Father Fray Juan Bano, agent of the mission of San Xavier del Bac, together with Xavier Ygnacio Sanches and Francisco Flores, residents of said village, were present, the former overbidding the fixed price in the name of the other residents of the village, and that the last bid by said agent, Father Juan Bano, was the sum of two hundred and ten dollars, and the same was sold to him for himself and the other residents of said village of San Xavier del Bac.

The proceedings leading up to the final sale were in regular order, when the land was offered by the board of sales first on the 13th of December, 1821 (R., 45–46), and the parties were notified that Father Juan Bano had bid for said land the sum of two hundred and ten dollars, and the same was again offered, with the understanding that on the third *almoneda* the same would be sold to the highest bidder. The third *almoneda* was held on December 15, 1821 (R., 46–47), and the public were notified that this would be the final sale. The agent of the Ortiz brothers, Manuel Escalante, and Ramón Muños, the agent of Father Bano, bid upon the property, and it was run up to two hundred and fifty dollars by Manuel Escalante, and the same was sold to the Ortizes for that sum.

It will be noticed all through these proceedings that FOUR *sitios* of land was the exact amount offered for sale, without regard to the boundaries or monuments that had been ordered to be placed at the end of the measurements, and the proceedings were regular up to this point.

On December 15, 1821, Bustamante, the president of the board and the governor intendant, ordered that the proceedings should be fully transcribed and delivered to Escalante, in order that within three days he should take such steps as he might deem proper in the matter, naming a person in Mexico to represent the parties before that court, and Escalante acknowledges receipt of this letter. (R., 47–48.)

The proceedings were made up, the amount of the purchase money, with the various taxes and charges determined, amounting in all to the sum of two hundred and seventy-two dollars and six reales, and it was ordered that payment thereof be made and a record of the proceedings be forwarded to the superior board of the treasury for its approval and action in the matter (R., 48) and Escalante duly notified (R., 48).

The provincial board of sales issued an order of notice and its approval in the matter to the superior board of the treasury (R., 48–49), and Bustamante, the intendant, ordered that these resolutions be complied with (R., 49).

Then follows the entry in the book of the treasury at Arizpe of the amount of the sale and charges (R., 49), and the same was duly certified to at Arizpe on December 17, 1849, by Tomas de Escalante and Miguél Maria de la Fuente (R., 49).

No further action was taken in this matter until 1849, when it appears that on January 30 of that year, at Ures, Tomas and Ygnacio Ortiz presented themselves at the general treasury soliciting that title to the land be issued to them, and having made the payments as required for the four *sitios* comprising the place of San Ygnacio de la Canoa the treasury agreed to issue the title which they solicited (R., 49–50), whereupon the treasurer-general proceeded to issue the final title on February 2, 1849 (R., 50–51), wherein he states that by virtue of the power in him vested, in the name of the state, he granted and confirmed title in lawful form for the FOUR *sitios* of land for the raising of large cattle and horses comprised in the place called San Ygnacio de la Canoa, within the jurisdiction of the district of that capital, upon Tomas and Ygnacio Ortiz, warning them that if they should allow it to become totally abandoned or deserted for the space of three consecutive years, or if any person should register them, proving in that event such facts, they would be declared public lands and be adjudged anew to the highest bidder, except, however, in cases where the abandonment may be occasioned by well-known hostile invasions and only for such periods as such invasions may last; notifying them to keep within the boundaries established by the survey made in 1821 by Ygnacio Elias Gonzales, at this time deceased; observing also in every respect article 63 of the organic law of the treasury No. 26, of July 11, 1834, which requires them to maintain monuments of lime and stone under a penalty of a fine of twenty-five dollars.

Upon this the following indorsement is made (R., 51):

> This title is recorded on page 75 and the other side of the respective book.
>
> [*Rúbrica.*] TERAN.

The treasurer of the state certifies that he received thirty dollars charges for issuance of this title (R., 51), and the whole concludes with the certificate given at Ures, February 2, 1849, and signed by Antonio T. Peralta (R., 52).

YGNACIO BONILLAS testified, on behalf of the plaintiffs, that he was thirty-seven years of age, resided at Magdalena, Sonora, Mexico, and is by profession a mining engineer and surveyor; is familiar with the Spanish language, as it is his native tongue; has had experience surveying lands claimed under Spanish and Mexican titles since 1883; has surveyed this grant. The data upon which he made the survey was taken from the *testimonio.* He has found the *expediente* of this *testimonio* in the office of the surveyor-general at Hermosillo, and he states that on the back of the *expediente* is a note that the title was issued, signed by Teran with his *rúbrica*, this indorsement, however, bearing no date. The *expediente* was on duly stamped paper. He thinks the signatures of Escalante, Fuente, and Teran are genuine. Witness testifies that the map he made correctly represents the tract of land called for in the *testimonio* as the San Ygnacio de la Canoa grant, *according to the landmarks set out in the title papers;* that he found every monument called for in the papers, with the exception of the center monument, which could not be found, because

it has probably been washed away. The grant of land called for was four leagues, and the area found within the monument was *46,696.02 acres*. The map was made from his notes. Witness identifies the signature of Antonio T. y Peralta.

The witness then describes the manner in which he surveyed the grant, to which I desire to call the especial attention of the court. (See R., 14, 15, 16). The map in the record is a copy of the map based upon this survey, and according to it the grant contains 46,696.02 acres.

Witness had examined a large number of *expedientes* in the archives at Hermosillo and had made memoranda of some. Each one of the *expedientes* which he examined was contained in the printed catalogue of *expedientes* of 1869, and were considered genuine by himself and the Mexican authorities. (Exhibit C was here offered in evidence over the objection of the Government. It consists of notes made by Mr. Bonillas from the various *expedientes* in the *toma de razon*, which he had examined, and will be found R., 58–67.) Witness identifies translation of a letter signed by José Maria Mendoza, dated Arizpe, November 20, 1830 (Exhibit D, R., 67, 68).

Identically the same letter was written to a number of individuals claiming different grants, wherein Mendoza states that the commissary-general of the state charged him to deliver to the interested parties several titles of grants and other confirmations of land surveyed, appraised, auctioned off, and adjudged by the treasury of the federation before the classification of the revenues, after having first received the fifty dollars of fees to

which each one is subject, and there being among the said titles that of the individual to whom he addressed the letter.

[NOTE.—Having had occasion to observe the actions of Mr. José Maria Mendoza, I have concluded that his desire to inform certain gentlemen that they could obtain titles of confirmation from his office was induced by the fact that a fee of fifty dollars per title was to be obtained therefor.]

The plaintiffs offered in evidence certificate of Mr. Aguilar, the present treasurer-general of the state of Sonora, dated February 5, 1895 (Exhibit E, R., 68), as to the authenticity of a document which purports to be a letter signed at Arizpe, January 16, 1831, within the initials "J. M. M.," which I assume is José Maria Mendoza, directed to Ramón Romero, and it is substantially the same as the other letter. The grant in this instance, however, is the San Rafael de la Zanja, one of the grants situate in the present territory of Arizona, a suit for the confirmation of which is now pending before the Court of Private Land Claims, and is similar to that of the Sonoita claim, and is to be found in this record (R.,70–77).

Plaintiffs next offered in evidence certificate of treasurer-general Aguilar (Exhibit F, R., 68, 69). Counsel for plaintiffs stated that this was offered to show a statement or admission by the chief federal officer of the republic of Mexico in the year 1831 that the public lands had been sold as stated, and that at that time, 1831, he received payment for lands sold in 1824. It seems that this instrument is a copy of the indorsement

on the *expediente* of the San José del Carrizo grant, issued in the year 1825.

Exhibit G (R., 69, 70) is a similar instrument indorsed on the *expediente* of the San Rafael de Juriquipa grant, made in the year 1824.

Exhibit H (R., 70) is a letter of Pablo Frayjo to Mendoza, dated January 27, 1835, giving the reason why the San Rafael de la Zanja had not been properly occupied.

Continuing, the witness Bonillas states that he has seen a number of the original *titulos* of grants named in his memoranda and referred to in Exhibit C (R., 58). That he has had in his hands the *testimonio* of the grant called Alamo de Sevilla; was appointed to make a survey of that grant in 1885; it was recognized as a good title and the owners were in possession of the grant. Has seen a certified copy of the *testimonio* of the Batana grant, situated in the district of Arizpe, and has made a number of surveys of grants in that district. The Batana grant calls for four *sitios*. He established the four corner monuments according to the calls of the title. It was recognized as a valid title and parties claiming the grant were in possession under that title. Has had a certified copy of the *testimonio* of the Cuchuta grant, for eight *sitios*, and has made a survey of it, both of all the lands within the old monuments and marked each; also placed monuments and marked the *cabida legal*. The parties were in possession of the property and the government recognized the *cabida legal*. The government recognized the *cabida legal* of other grants, and in the Batana and Cuchuta they

would have recognized the *demasias*, but the owners did not want it.

[NOTE.—This is the first suggestion which has come to my notice, either in the testimony of a witness, a written communication, or document of any kind, where one who was absolutely entitled as a matter of right under an original grant to the *demasias* refused it.]

In the Alamo de Sevilla the grant called for four *sitios*, but there were twenty-three and a half. The government issued title for the *demasias* and recognized the *cabida legal*. (I take this to mean that the parties were permitted to purchase the *demasias* under the *demasias* law, and had their grant for the *cabida legal* confirmed; that is, within the outboundaries of this grant, according to the monuments, there were twenty-three and one-half *sitios*, when the grant itself called for the specific number of four *sitios*, the *cabida legal*, and the grantee was permitted to purchase the excess of nineteen and one-half *sitios*, making the grant the same as an original grant of twenty-three and one-half *sitios*.)

On cross-examination, Mr. Bonillas testified that all the grants he surveyed had *demasias*. He surveyed the *demasias* in the Alamo de Sevilla grant. Witness states the *cabida legal* is the amount of land called for in the title papers. The land which was not included in the title, but was included within the natural objects or monuments which the parties were claiming, was required to be denounced by the parties claiming the *cabida legal* and paid for by such party, and if he did not do so, it was subject to denouncement by anybody who might want it. States the party in possession and owning the

grant had a number of privileges; he could acquire the *demasias* by paying one-half the tariff price for the public lands; in case anybody else petitioned for the *demasias*, the party owning the land was still entitled to it by paying the full price, one-half of which went to the government and the other half to the party making the denouncement. In relation to this specific grant, the witness testified as follows:

Q. Take this grant now, the grant on trial, taking the initial point as you have established it, take the courses and distances as given therein respectively—not the monuments—would it not make about four *sitios?*

A. It would make four *sitios* exactly.

Q. Then within the area of the Canoa grant as surveyed by you, there are a little more than ten *sitios*, isn't there?

A. It would be ten *sitios* and 76/100.

Q. If these title papers were given you, you would say under the custom of Mexico, or the law, or whatever it is, you would say that this title covered four *sitios*, wouldn't you?

A. No, sir; I would say that the *cabida legal* was four *sitios* and the *demasias* was six and a fraction.

Q. Six and seventy-six hundredths?

A. Yes, sir.

Q. This list that you furnished Mr. Ford and which was offered in evidence (referring to Exhibit C), does that contain sufficient data? I notice you don't give in the second one—the Batana; you don't give the name of the officer who is supposed to have issued the title on May 25, 1825?

A. That is the contents of my notes. My notes in full are "petition addressed to *Intendente* Bustamante; admitted and ordered on August 16, 1822,

for survey and other proceedings; receipt for payment signed by Fuente and Gonzales October 20, 1822; on *expediente* the following, in handwriting of Riesgo, note on 15th of May, 1825, title was issued."

Q. But this *expediente*, or rather this note there, doesn't state that Riesgo issued the title?

A. Not the way it is worded; but he signs it and was the officer at the time issuing these titles.

Witness testified in the Aribac case that the grantees in that case were the same as in this, Tomas and Ygnacio Ortiz. He testified, as to the grant in this case, that the first note on the *expediente* was made by Teran and that the note read "title was issued," but does not give the date of issue; he does not remember any other indorsement on the same by Teran; does not remember whether the certificate of Teran states that it was noted in the *toma de razon*, as he did not examine the book at the time, but afterwards, on examining it, found a note stating that title had been issued, giving the date. The note was as follows: "2d of February, 1849, title to grant was issued for four *sitios* for stock raising—raising of cattle and horses—in favor of Tomas and Ygnacio Ortiz, included in the place called San Ygnacio de la Canoa, jurisdiction and *presidio* of Tubac, said persons being residents of said place of Tubac." Signed by Teran, *rubrica*. Does not know how many grants were made in the state of Sonora between 1820 and 1849, but there were a large number; knows there were a great number made in 1833; has examined some grants made in Arizona, called *intendente* grants, commencing in 1812 and 1820 and perfected in 1825, 1833, and 1849, but does not remember whether they have such certificates

as Exhibits F and G. (See R., 68–69.) (It is admitted by counsel for plaintiffs that there are none.) Witness does not remember of a case of an entry in the *toma de razon* where the amount of the purchase money was stated; that the *toma de razon* simply states or gives the date that the title was issued, the name of the person to whom the grant was made, the area of the grant, and the jurisdiction in which it is located; the general name of the grant is also given.

On redirect examination witness states that the letters written by José Maria Mendoza, about which he testified (see R., 67–68), were written because the fees had not been paid; states that the *cabida legal* and *demasias* about which he testified exists under the law of 1863.

His recross-examination was as follows:

> Q. Mr. Bonillas, the government of Mexico, so far as your examination of these titles go, didn't recognize and didn't so construe it, that the title had passed for any more land than the party had bought, although he might be claiming more land within the natural objects or boundaries, and that was the reason for the "*demasias*" law?
>
> A. In case where title was issued for a determined area I think that was so, but in the case where the title was issued for the amount within the boundaries, for the land included within the boundaries, there was no *demasias* in such a grant. (R., 12–23.)

Santiago Ainsa testified (R., 23) on behalf of the plaintiffs. This witness is the claimant in the Sonoita case, which is for argument with this one, and also testified in that case. As to this case, he testifies that he is

an attorney-at-law and familiar with the Spanish language; has examined the various *expedientes* in the office of the treasurer-general of the state of Sonora, and found the *expediente* of the San Ygnacio de la Canoa grant there and made an examination of it in 1893. (It was here admitted by the United States that the San Ygnacio de la Canoa grant is in its proper place in the archives of the treasurer-general of the state of Sonora at Hermosillo, and is recorded in its proper place in the *toma de razon* in the office of the treasurer-general.) Witness examined the book of receipts and disbursements for the year 1849, and finds the certificate attached to the *titulo* of this grant to be a correct translation of the entry therein, the amount stated being thirty dollars, which was the fee for issuing the title. (R., 23–24.)

CARLOS VELASCO testified, on behalf of the plaintiffs (R., 24), that he is fifty years of age, resides at Tucson, and is a newspaper publisher. Witness copied from the archives of the state of Sonora the laws passed by the state of Sonora and the communications of congress; witness has a copy which he made from the third communication, dated May 9, 1825, from the office of the secretary of the state congress; it is addressed to the governor of Sonora and Sinaloa. He made this copy himself from the original document, and it is offered in evidence by the plaintiffs. (Exhibit I, R., 78.) (This document is signed by Tomas Escalante, deputy secretary, and José Jesus Almada, deputy secretary, and bears the heading, "Office of the secretary of the state congress." Its purport is that the state was claiming the right to confirm

land titles, based upon the fact that it was entitled to the revenues from the sale thereof; that there was some doubt about the matter; consequently a communication was addressed to the commissary-general, and not having received a reply he assumed that his contention was correct.)

José Maria Elias testified, on behalf of the plaintiffs (R., 24), that he is sixty-seven years old and lives at Tucson, having also lived at Tubac and Sopori; knew Tomas and Ygnacio Ortiz and has heard of the Canoa grant, first hearing of it in 1843 or 1844, when it was claimed by Tomas Ortiz; it is situated on the Canoa, about five leagues from the *presidio* of Tubac. In 1843 a man by the name of Pedro Quijada had his stock and cattle at Canoa, and he was married to a sister of the Ortizes. In 1844 he took his cattle out; in 1847–48 he knew four men farming on the grant; he himself farmed there on two occasions. The parties were there by consent of Tomas Ortiz. In 1851–52 a son of Tomas Ortiz, Jesus Maria Ortiz, was farming a place close to the old ranch. On cross-examination, he stated that he had testified as a witness the day before in the Sopori case; that he had known a man about forty-seven years of age living at Tucson by the name of Jesus Maria Elias.

He finally admitted that he had given his deposition in the Sopori case in 1880, and after controversy, and explanations to him by the interpreter, he says that the testimony given in the Sopori case was correct and that he did not know of any survey of the Sopori grant in

1848, to which fact he had testified in that case in 1880. Witness repeats that he saw a man living on this grant in 1843 or 1844, with some cattle; in 1843–44 cattle were turned loose everywhere, but in 1847–48, or thereabout, the Indians were very bad and they were driven toward the interior of the district of Magdalena and herded there. In 1849–50 neither Tomas nor Ygnacio Ortiz lived on this grant. In 1846, '47, '48 there were some families there, and in those years there were a great many massacres by the Indians and it was very dangerous. A man who was living there in 1842–43, cultivating the land, had no family, but had his cattle and stock. He did not know how long he remained there, but he saw him on several occasions. The witness testified as follows (R., 27):

> Q. Didn't you testify in the Sopori case, on the 24th day of November, 1880, before the United States surveyor-general, John Lawson, at which the following question was asked: "Question. Do you know when the said *rancho* was measured, in pursuance of the alleged proceedings under the Mexican government for title?—Answer. I do; it was measured about"—— (witness interrupts with answer as follows:)
>
> A. No, sir; I have not given such testimony.

(The deposition given by this witness and referred to in the preceding question was given in the Sopori case in 1880, which grant includes this grant, and is to be found in this record (pp. 81–82).

Exhibit J is a stipulation as to the abstract of title, showing the darreinment from the original grantee to Maish & Driscoll. (R., 78–79.)

Exhibit K is a translation of a letter addressed to the treasurer-general by Francisco Fernandez. (R., 79.)

Exhibit L is a certificate by Mendoza, showing the claim to the Canoa grant, dated in 1853. (R., 80.)

Exhibit M is a letter from Tomas Ortiz to his nephew, José Elias, in relation to the *testimonio* for the Canoa grant and the conflict with the Sopori grant. (R., 80–81.)

This is all the testimony on behalf of the plaintiffs.

On behalf of the government, the deposition of José Maria Elias, taken before the surveyor-general in the Sopori case in 1880, was introduced. (R., 81–82.)

The testimony offered with relation to the adverse claim under the Sopori grant seems to have been omitted from the record, but it serves no purpose, so far as the government is concerned in this case, as the court, upon the trial of the Sopori case, sustained the contention of the government that the grant in that case was a forgery.

BRIEF AND ARGUMENT.

The proceedings in this case were initiated at the same time as those for the Sonoita grant and the cases are to be heard together. In the make-up of the *expedientes* they are identical down to the point of the issuance of final title.

The actions of the various officials in making up this *expediente* were without lawful authority and vested no equity against the government. (*Ainsa* v. *United States*, No. 27; Sonoita grant; Brief, I.)

No effort seems to have been made by the Ortiz brothers to obtain title from the commissary-general,

Riesgo, as was the case with Elias for the Sonoita grant. Twenty-eight years after the *expediente* had been concluded and ordered sent to the superior board of the treasury at City of Mexico for its approval or such resolution as it might determine (R., 49) the Ortiz brothers presented themselves at the general treasury of the state of Sonora, soliciting title upon the *expediente.* The treasurer-general of the state issued the title, receiving the fee of $30. (R., 50.) In the preamble to the *testimonio* and also in the grant this officer of the state of Sonora undertook to justify his action by certain specified laws. In the preamble (R., 30) this officer claimed the national law of August 4, 1824, defining the revenues of the nation and states, conceded to the states the revenues not reserved to itself, and states one of them to be the lands of their respective districts for the disposition of which the congress of the state passed law No. 20 of May 20, 1825, and subsequent laws embodied in sections 3, 4, 5, 6, and 7, chapter 9 of the organic law of the treasury No. 26, dated July 11, 1834, the sale of lands being assigned anew to the states, which has continued and will continue to collect revenues (taxes) by virtue of the general law of classification, dated September 17, 1846.

In order to ascertain the lawfulness of the act of the treasurer-general it is necessary to determine the question as to whether the vacant public lands belonged by full title, with right of disposition, to the states; and if so, when did they pass from the national government.

It has been contended in the case of *United States* v. *Coe* (Algodones grant) that the states were originally the

owners of the vacant public lands, but I am not sufficiently impressed to say more than was said in that case.

It clearly appears the state laws of May 20, 1825, and July 11, 1834, providing for the sale of the vacant public lands, derive their national authority from the revenue law of August 4, 1824.

I have contended that the vacant public lands of the nation were in no way the subject of any provision of the law of August 4, 1824, and were not placed thereby under the jurisdiction of the revenue officers of the national government, nor assigned in terms or by implication to the states. The policy of the government on the vacant public lands was defined and declared in the law of August 18, 1824 (colonization law). The vacant public lands were evidently intended to be held for colonization at least until the government should make some other disposition. No machinery was provided by the national government for the sale of any vacant public lands until the regulation promulgated under the law of January 26, 1831.

The vacant public lands are not mentioned in this law nor in the regulations of July 7 and 20, 1831, and it may be doubted with great force whether this law and regulations were intended to affect in any way the dispositions of the vacant public lands. But, recurring to the original policy declared by the colonization law and keeping it in mind until we can discover a change, I think whatever rights the states had can be ascertained. The state of Sonora, because of its immunity from strict surveillance and control, on account of its great distance

from the federal district, had, as Mr. Orozco said, "susceptibilities, and susceptibilities that were sometimes dangerous," which may account for its extravagant claims to the public lands from time to time. The third article of the colonization law directs that the states shall enact as soon as possible laws or regulations for the colonization of their respective demarkations in strict conformity with the constitutive act, the general constitution, and the rules established by this law.

The preceding article (2) of this law states its object to be the colonization of the vacant lands of the nation. In delegating the right to the states to dispose of the vacant lands in their respective demarkations, nothing contained therein warrants the assumption that title passed. Judge Castañeda, in his testimony in the Coe case, speaking of the state laws of May 20, 1825, and July 11, 1834, said it was not claimed they were intended for colonization nor in pursuance of any of its provisions. The third article of the colonization law is the only source from which the states derive any rights to intervene in the matter of vacant public lands.

I have been unable to find that a single state of the Mexican republic, except Sonora, ever claimed any rights to or over the vacant public lands under any of the provisions of the law of August 4, 1824. During the period of the Central System, 1835 to 1846, the states and officers had no existence, and the departments were under the exclusive control of the national government, and the vacant public lands were the special subject of consideration owing to the enormous public debt the country was compelled to carry. The first direct declaration

on the subject, wherein revenue was to be considered in providing for colonization, is found in the law of April 4, 1837 (Reynolds, 222), and subsequent laws and regulations, April 12, 1837 (ibid., 223), April 17, 1837 (ibid., 224), September 15, 1837 (ibid., 227), June 1, 1839 (ibid., 232). Upon the reestablishment of the federal system, the vacant lands were distinctly provided for in the revenue laws.

The laws of August 22, 1846 (ibid., 256), reestablished the constitution of 1825. The law of classification of the revenues September 17, 1846 (ibid., 257), is referred to by Mr. Teran in the preamble and grant as his authority. Among the revenues reserved therein to the national government is the following:

> ART. 3. The proceeds from the sale of free lands which the law assigns to the federation. El producto de la venta de tierras libres que la ley consigna á la federación.

It will be noticed, commencing with the decree of April 4, 1837, that the vacant lands were made the object of revenue as well as colonization, and probably to prevent the states from making any such claim as the state of Sonora seems to have made under the law of August 4, 1824, originally classifying the revenues, a specific article (3) was inserted reserving these revenues to the federation.

A plan of colonization was provided for in the establishment of the bureau of colonization (Reynolds, 261, 263, 276). It seems to me there is no ground left for the contention that the treasurer-general of the state of Sonora had any authority from the national government

to extend a title on this old *expediente* completed twenty-eight years before. I think I have in this and the Coe Case demonstrated that the vacant public lands had never been assigned to the states as claimed, nor had the national government ever recognized any such fact except such as might arise under the third article of the colonization law of August 18, 1824.

If the vacant public lands did not belong to the nation, then Teran's act in issuing this title was unlawful; but if they had been ceded to the states, did that cession include land which counsel claims had been segregated and sold to the Ortiz brothers in 1821? Assuming the position taken by counsel in the Sonoita grant (*Ainsa* v. *United States*, No. 27), that upon the conclusion of the *expediente* payment of the purchase money and order of transmittal to the superior board, some property right vested which was strong enough to sustain a lawful demand for title, then the cession to the states did not carry this land, and it was not part of the vacant public domain, but was private property, and the only jurisdiction the state acquired over it was political.

Admitting for this purpose that the vacant public lands had been ceded to the states, the only ground upon which the right of treasurer-general Teran to issue this title based upon the ancient *expediente* is, that the proceedings in 1821 had not reached that stage where the land was segregated from the public domain and vested as private property in the Ortiz brothers; to make such an admission in this case would be to denounce the action of Juan Miguel Riesgo in the Sonoita grant as without authority. I respectfully commend to the careful

consideration of counsel these evidently inconsistent positions.

If this land came under other than the political jurisdiction of the state, the same was forfeited for failure to present the matter for composition and confirmation. (LAW NO. 27, STATE OF SONORA.)

Until special agents Tipton and Flipper visited Sonora last February I was not aware of this law, but it is translated in their report, page 104. The law No. 167 of July 10, 1830, referred to therein, they were unable to find, but it is evident that both laws had reference to the composition for and confirmation of titles which had not been completed, and it would seem that the Ortiz brothers were not at all solicitous about their title, although counsel contends they were continuously in possession, use, and occupation under the old *expediente*.

The law of Sonora of May 30, 1834 (Reynolds, 184), provides for presentation by holders of incomplete title. The decree No. 10, June 28, 1833, we were unable to find. Again, the state in its law of July 11, 1834 (ibid., 186–188), article 61, declares unless the provisions of the same and of No. 10 of May 30, 1824, are complied with, the lands shall be considered public lands and denounceable.

The next law of the state on the subject is No. 51, May 12, 1835 (report special agents Tipton and Flipper, 104.) Article six of this law clearly places the judgment of absolute denouncement upon this title so far as the state could do so.

The principal ground upon which it is sought to sustain the extension of title in this case, as in the Sonoita

case, is that the Mexican nation has recognized the acts of the various officials as being lawful and binding upon it; that the Mexican attorney-general has repeatedly held these titles to be valid and the proceedings leading to the same in due form. I have never seen an instance where the Mexican attorney-general, if such an officer every existed, passed upon any grant of land or any questions arising therefrom. In their zeal to sustain these grants I fear counsel overestimate the dignity and powers of the legal advisers of the local officials who attempted to extend these titles; and I insist that prior to the treaty the Mexican nation did take notice of the condition of affairs, such as existed in Sonora, and placed its judgment of condemnation thereupon. It must have done so in 1846, prior to the time Teran attempted to extend this title.

On December 4, 1846, a code of colonization and public lands was promulgated (Reynolds, 276), which provided for the sale of all public lands under the direction of the bureau created November 27, 1846 (ibid., 261). On December 4, 1846, regulations for the bureau of colonization were issued (ibid., 263) and transmitted to all the governors of the states with this code, which recommends an exact compliance with the decree establishing the bureau of colonization, and states the reasons for reducing the price of the public lands below ten reals per acre, the price fixed by the law of April 4, 1837. It is there stated (ibid., 278):

> The government has believed it ought to leave to congress to decree certain transcendental points,

such as those relating to the internal government of the colonies, the formation of states composed thereof, and the religion of those where the inhabitants are not Catholics, and also reserved to congress the decision of the cardinal point as to whether the matter of colonization should remain reserved to the federal power, as is absolutely necessary, that it be carried out under uniform rules and that it have the most complete effect, applying, nevertheless, to the states a part of the proceeds from the public lands sold, and another to the redemption of the public debt and to the capitalization of the salaries of employees who may wish to retire from the service.

In none of the laws or regulations subsequent to the reestablishment of the federation is the treasurer-general of the state of Sonora authorized to make grants of land, to extend title upon old *expedientes*, or to intervene in the matter of the public lands in any way; and it must be clear that the whole policy of the law was to resume absolute control over the colonization and disposition of the public lands thereunder for revenue by the national government. Such specific laws and regulations and such a perfect system as was provided must of necessity have pronounced the acts of the various treasurers-general of the state of Sonora, in attempting to extend titles, as nullities. It will be noticed that the federation is, by these laws and regulations, asserting its right to and control over the public lands lying within the states for colonization and for sale for revenue, to the same extent and for the same purpose that it asserted its right to compel all the states to colonize by donations under the provisions of the law of August 18, 1824.

The decree of September 17, 1846 (Ibid., 257), reenacted article 3 of the law of September 21, 1824 (Ibid., 123), which made it the duty of the commissary-general to collect in the states the revenue belonging to the republic, and this officer was not only to collect the revenues due the national government, but was to collect the one-third part of the proceeds from the sale of the vacant public lands and apply it to the payment of the contingent of the states (Ibid., 260), so that the state officers were precluded by virtue of these regulations from having anything to do with the national revenues and finances, and where can it be found that a treasurer-general of a state in 1849 had authority to extend a title based upon the law of September 17, 1846, or any other proceedings, law, order or decree?

The whole system which is sought to be bolstered up by repeated unlawful and arbitrary acts of commissaries-general and treasurers-general, was denounced by competent and lawful superior authority pending the negotiations for the treaty. On November 25, 1853 (Ibid., 324), Antonio Lopez de Santa Ana annulled the sales of lands made by the states and departments and declared that the public lands were the exclusive property of the nation and never could have been alienated by virtue of decrees, orders, and enactments of the legislatures, governments, or local authorities of the states and territories of the republic; also that the sales, cessions, or any other class of alienations of said public lands that have been made without the express order and approval of the general powers, *in the manner prescribed by the laws*, were null and

of no value and effect. In that decree it is also directed that the officials, authorities, and employees, upon whom devolves the execution of the decree, shall proceed, as soon as they receive it, to recover and take possession in the name of the nation of the lands comprehended in the first article that may be in the possession of corporations or private individuals, whatever may be their prerogatives or position.

It also provides that the judicial, civil, or administrative authorities shall admit no claim of any kind, nor petitions whose purpose is to obtain indemnification from the public treasury for the damages the unlawful holders or owners may allege, under the provisions of the preceding article; and they shall preserve their right only against the persons from whom they obtained the lands which they are now compelled to return.

This decree was the law of the land at the time the treaty was entered into with Mr. Gadsden. It was a construction placed by competent authority upon every title similar to those presented in this case, and although not embodied in the treaty, yet when we come to determine our obligations under it according to the laws of the country, we must read into the treaty as a part of it the law of the land as declared by the supreme treaty-making power at the time we assumed the obligation to recognize only such titles as that government itself was in conscience bound to recognize. I do not care whether Santa Anna's government was obtained by force or revolution, whether it was dictatorial or monarchical in its form, purposes, or intents, it can not be gainsaid that his

government was the supreme authority in Mexico, which the United States recognized in negotiating the treaty.

The integrity of the same can never be questioned by the judicial branch of this government when the political department has seen proper to recognize its supremacy in Mexico by entering into with it the most solemn obligation known to nations. I am aware that there is a spirit of prejudice, unjust as I believe it is, against Santa Ana, but we are in no position to challenge or permit to be challenged in the courts of the land the right and power of that government to pass upon the validity of the acts of officials, or upon the validity of titles to public lands which had been attempted to be taken from it, part of which land subsequently fell within the limits of the United States.

This decree was followed by the decree of July 7, 1854 (Ibid., 326), carrying out the announcement made in the former decree. It was the outgrowth of it and necessary in order to make it full and complete. I desire to call to the attention of the court the sixth article of this decree, which shows that the government understood and construed the laws of the country as I have attempted to do in this case, to wit, that the vacant public lands could not be disposed of by any one except in pursuance of the declared purpose of extending and promoting colonization under the law of August 18, 1824. It appears that Santa Ana was not attempting to forfeit titles, was not attempting to deprive individuals of their property without due process, but was denouncing certain characters of title within which was included the one in this

requisites referred to in the preceding article (two), or in contravention of the provisions of article four of the law enacted by the general congress on August 18, 1824, were void and of no value, showing clearly that dispositions of the public land, made prior to that time, in order to be lawful, must have conformed to the system of colonization adopted on August 18, 1824, and which was evidently continued in the department of revenue commencing with the decree of April 4, 1837. (Ibid., 222.)

I do not suppose it has ever been contended that where a grant was made to an individual by competent and lawful authority it was subject to denouncement or failed of recognition by any government. I have no doubt the stringent provision contained in the first subdivision of section 13 of the act of March 3, 1891, creating the Court of Private Land Claims, originated because certain members of congress, in their investigations, found that an attempt had been made to strip the Mexican nation of its public domain by various officials pretending to act under laws that had ceased to exist, and in the distant territories, departments, and states where the national officials could not be subjected to strict surveillance and supervision, often being residents, and probably involved in intrigues against the national government, they were unreliable sources from which to draw information.

This may also account for the failure of congress to insert in the act that "the usages and customs" of the country were to be considered as one of the principles under which adjudication was to be had, such as was

case. By his grace he permitted the holders thereof to make composition with the government and obtain under such terms as might be prescribed a complete title to their property.

After Santa Ana was deposed, Martin Carrera, general of division, president *ad interim*, extended the time by his decree of August 20, 1855 (Ibid., 328), for presenting these titles for composition, and specifically refers to the law of July 7, 1854.

Juan Alvarez, president *ad interim*, on December 3, 1855 (Ibid., 329), denounces the decrees of Santa Ana as having been promulgated without authority, and pronounces valid all grants issued between September, 1821, and the date of his decree, 1855, which had been issued by the superior authorities of the states or territories under the federal system by virtue of their lawful faculties, and by those departments or territories under the central system, with the express authorization or consent of the superior government, if the acquisition of said lands be in conformity with the existing laws (Ibid., 329). Comparing this decree with the declaration contained in the law of July 7, 1854, promulgated by Santa Ana, it will be found that they are identically the same in effect. One denounces titles not lawfully and regularly issued and the other confirms titles lawfully and regularly issued.

It will be noticed, in article three of this decree, the still further declaration is made, which exactly conforms to the language used by Santa Ana in his decree of July 7, 1854, that the alienations of land made by the authorities of the states, departments, or territories, without the

included in the California act of 1851; further realizing that many of the decisions of this court, repeatedly cited by counsel in this case, were based upon the broad terms of that act, and that many confirmations were obtained under it of titles that could never bind the conscience of the Spanish or Mexican governments, it declined to insert as a principle of adjudication in the act of March 3, 1891, either the usages and customs of the country or the decisions of this court applying under restrictions imposed. Finding these words omitted from this act, and observing the restrictions imposed by the thirteenth section, and especially the first subdivision thereof, we must attribute to congress some intelligent purpose in declining to recognize the titles extended upon old *expedientes* by Juan Miguel Riesgo and Antonio Teran y Peralta.

Concluding this branch, I respectfully suggest to the court that we have been able in these two cases, Conoa and Sonoita, to work out a continuous, consistent, and complete system of laws regulating the disposition of the public domain from 1786 to 1853. Subjecting all of these claims to the system provided for by law during the time the grants are alleged to have been executed and extended, it is submitted that they can not be sustained under the Santa Ana decrees and subsequent decree, nor under the law authorizing their presentation to the judicial branch of this government.

II.

The grant, if valid, was limited to four *sitios* (17,353.84 acres), and the claim according to the location by Mr. Bonillas contains 46,696.2 acres. Assuming the initial

point can be found as claimed, still, according to the survey in the *expediente* as now attempted to be retraced by Mr. Bonillas, instead of four *sitios* it contains ten and seven-tenths, so that, although it was possible for the surveyor to have located and monumented four *sitios*, he did not do so (but simply designated a larger area within which the location might have been made), and failing to do so, the claim falls within the prohibition of the treaty and within the principle decided in the Ainsa case (Nogales grant), 161 U. S., 208.

The boundaries defined and monumented contain ten and seven-tenths instead of four *sitios*. A grant is not located within the meaning of the treaty where the lands so granted can not be identified by the boundaries called for in the grant.

The court did not file an opinion in this case, and by reason of the peculiar wording of the decree, which was drawn by counsel for the plaintiff and approved by the chief justice, it is contended that four members of the court have concluded the positions taken by a majority in the Sonoita grant (*Ainsa* v. *United States*, No. 27), San Rafael del Valle grant (*Camou* v. *United States*, No. 28), and Babocomori grant (*Perrin* v. *United States*, No. 30), were incorrect, and they would, if these cases were now before the court, hold them all entitled to confirmation according to boundaries by natural objects.

I am not authorized to speak for the majority of the court, nor am I able to affirm or deny the correctness of the claim, but it would seem if any one of them concluded he was wrong in any other case, it was due to

himself to so state, but I am able to call the court's attention to a very carefully prepared opinion by Mr. Justice Murray (R., 102), giving his reasons for holding this grant invalid and not entitled to confirmation.

It is respectfully submitted the judgment should be reversed and the petition dismissed.

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JOHN K. RICHARDS,
Solicitor-General.